IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 511

CITY OF MENASHA,

Petitioner,

vs.

CLARENCE FURTON, TRUMAN FURTON, LUKE FURTON, FRED FURTON, AND RALPH JOHNSON, CO-PARTNERS DOING BUSINESS AS FURTON BROTHERS CONSTRUCTION COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Justices of the Supreme Court of the United States:

City of Menasha, by its attorneys, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered on June 21, 1945, in Cause No. 8635 in which Respondents were Plaintiffs and Appellants, and Petitioner was Defendant and Appellee, reversing the summary judgment of the District Court of the United States for the Eastern District of Wisconsin, which dismissed the complaint of the Respondents as Plaintiffs, and remanded the cause to the District Court with directions to try all factual issues, specifically enumerating the same.

Summary Statement of the Matter involved.

Respondents, a firm of contractors, commenced action in the United States District Court for the Eastern District of Wisconsin against Petitioner, a municipal corporation, as Defendant, to recover damages in the sum of $100,994.71 for breach of warranty founded upon a written contract between plaintiffs and defendant for the construction for the defendant of a pre-settling basin to be used as a part of its waterwork's system at the total contract price of $78,000.00.

The project involved the excavation of a pre-settling or water basin, the construction of reinforced concrete and masonry walls, earth dike, chemical feed house and a 30″ pipe line from the pre-settling basin to the water purification plant, including all necessary coffer dams, and pumping, excavation and back-filling in accordance with plans and specifications which were specifically made a part of the contract by the terms thereof. (Contract 18-20; Plan R. 97; Specifications R. 20-36; Instructions to Bidders R. 17.)

The settling or water basin is a basin approximately 725′ on one side bounded by a road or land, and bounded on the other three sides for a length of approximately 1900′ by water, namely, an outlet creek, the Fox River, and a dredged channel. (R. 97.)

The basin was designed to permit the natural flow of water from an inlet creek or channel through a headhouse, in which the water was to be chemically treated, into the settling basin. Baffle walls were constructed across the basin to retard the flow of the water so that the algae which is abundant at certain times of the year, and other solid impurities would settle to the bottom. From the settling basin the water was to be pumped through a pipe line approximately 3500′ to the pumping plant for further

purification treatment and circulation through the mains to consumers.

Plaintiffs allege that the plans and specifications prepared by defendant's engineer and made a part of the contract by the terms thereof "represented that rock existed at an elevation therein specified, which representation was relied upon by the plaintiffs in entering into said contract with defendant". (R. 12.)

Plaintiffs allege the expansion of this representation in "that in the construction industry, by custom under similar circumstances it is understood, and the parties to the contract contemplated and understood, that the term 'rock' as used in said contract is synonomous with the term 'bed-rock'." (R. 12.)

Plaintiffs allege further that "the contract contemplated the excavation of soil and material to bed rock, which could be accomplished by the method commonly known as 'stripping' wherein the contractor would have a bed rock footing for his machinery and equipment". (R. 12.)

It is admitted that during the progress of the work it was discovered that rock did not exist at the elevation specified under some portions of the area of the basin.

Plaintiffs allege further that by reason of the non-existence of "bed-rock" at the elevation specified a method of performance of the work of excavating the basin different than that contemplated was necessary, requiring "different and heavier equipment and extensive pumping and drainage, the laying of road mats to support machinery and upon which to travel; the weather conditions greatly interfered with the progress of the work because of the absence of bed rock upon which the work as originally contemplated could have been performed under adverse weather conditions," the work was more expensive than

that contemplated, and they claimed as damages the difference between their alleged actual cost and expense and their estimated cost. (R. 12-13.)

The representations alleged are only such as exist in the plans and specifications. (R. 12.) The contract provides for excavation of the proposed area to rock. (R. 18.) The specifications provide for the excavation to rock which is at elevation 87.2′ or approximately 7′ below the crest of the Menasha dam. (R. 29.) The existence of rock is indicated on the plan. (R. 97.) Elevation drawing of the head house specifies elevation of the footing (not specifying the footing as rock) as 87.2′ with a plus or minus sign which clearly means "more or less". On elevation drawing of the baffle walls the elevation of the rock foundation is given at 87.16′± and in elevation drawing of the dyke at 87.2′±. There is no other indication of elevation of rock excepting for the pipe line which has no relation to excavation of the settling basin.

There is no reference to method to be employed by the Contractor in performing the excavation work, no indication that it could be performed by the "stripping" method. On the contrary, instructions to bidders provided as follows:

> "Bidders must satisfy themselves, by personal examination of location of the proposed work, and by such other means as they may prefer, as to the actual conditions and requirements of the work, and shall not at any time after submission of a bid dispute, complain, or assert that there was any misunderstanding in regard to the nature or amount of work to be done." (R. 17.)

The Specifications provided that bidders were "expected to compare the plans and specifications with the site". (R. 21.)

That is the full extent of the facts initially presented by plaintiffs to sustain their cause of action for breach of warranty.

In counter-affidavit submitted by plaintiffs on motion of defendant for summary judgment Luke Furton, one of the plaintiffs, deposes and says that he was present with defendant's engineer at a meeting of defendant's Water & Light Commission when the contract in question was executed, and "at said meeting and prior to the execution of the contract one of the commissioners inquired as to whether or not it was definitely known that rock underlay the entire area at the specified elevation, and as to what would be the result if it did not". (R. 69.)

Affiant states further that thereupon he, one of the plaintiffs, explained that if it should develop that the rock were found to be higher in some places it might involve excavation of rock, and if the rock were found to be lower it might involve more expense to excavate the earth; that it would be up to the engineer and that under the contract plaintiffs would be paid their extra expense for such work. (R. 69-70.)

Then affiant proceeds to state that thereupon the commissioner who first inquired as to the definiteness of the information in reference to the elevation of underlying rock suggested an adjournment of the meeting to permit more accurate determination of the location of the rock, the expense of test boring was discussed, and the idea of making test borings dropped; that it was stated that plaintiffs might be required to do considerable work, at cost, and without profit, and affiant stated that plaintiffs would have to take their chances and could not get badly hurt as long as they received their additional costs (reference to a provision of the contract theretofore mentioned and hereinafter quoted). (R. 70.)

The contract provides for the payment of 85% of the value, proportionate to the amount of the contract, of labor and materials incorporated in the work up to the first day of each month and on substantial completion of the entire work a sum sufficient to increase the total payments to 90% of the contract price, "and thirty (30) days thereafter, provided the work be fully completed, and the contract fully performed, and proof furnished by the Contractor that all bills for material and labor have been paid in full, the balance due under the contract". (R. 19.)

Plaintiffs allege only substantial completion of the work and admit non-completion of the work and non-payment of lien claims. (R. 14.) As justification for such defaults plaintiffs allege that the withholding of payment by defendant to plaintiffs caused a financial stringency, "rendered it impossible for the plaintiffs to proceed to complete performance of the contract" and to pay all bills for material and labor. (R. 14.) No demand for payment until March 4, 1943, is alleged. (R. 74.) Supposedly, financial stability of the contractors or adequate financial backing is established by the provisions of the specifications requiring the contractor to furnish performance bond with surety, breach of the terms of which specification cannot be assumed. (R. 34-35.)

The contract provides that the work shall be completed on or before the 30th day of June, 1942, "time being of the essence of this contract". (R. 18.) Claim was submitted March 4, 1943, and the work was then only substantially completed. (R. 74.)

Plaintiffs' pleadings and affidavits present these additional facts. They allege no difficulties that were encountered in erecting the foundations for the headhouse or for the dike, but they submitted proofs to show that difficulties were encountered in placing the foundations for certain baffle walls.

Plaintiffs presented copy of estimate which they submitted for extra work in trenching and lowering of baffle walls of $9107.00, (R. 76) and letter from defendant's engineer in reference thereto stating:

> "The total amount involved should not be any more than the total listed in your estimate, and as we understand it the rock pitches r ward towards the south, so that the depth of excavation and the depth of concrete should be less than that given in your estimate, as well as the amount of reinforcing and the amount of forms." (R. 77.)

They presented an additional letter from defendant's engineer stating:

> "This will confirm verbal conversation this morning. It has been decided to trench for the footings only for the baffle walls, so long as the foundation material is as satisfactory as that we looked at this morning.
>
> The writer is satisfied that the foundation which is hard pan, made of crushed stone and blue clay which acts like cement to hold it together, is good enough for a 4-story building, and we think it is foolish to go to the extra expense to go deeper. Therefore, unless you find a much softer material than that we looked at this morning, it will only be necessary to trench for the footings, which will make the top of the footings flush with the bottom of the rest of the basin." (R. 80-81.)

They presented further Estimate No. 9, approved by plaintiffs, showing allowance of extra item for this work in the amount of $3000.50. (R. 84.)

These proofs establish agreement between the parties as to the effect of the absence of underlying rock at the elevation anticipated and as to the amount of extra work occasioned thereby.

On motion for summary judgment defendant disputed none of the facts enumerated presented by plaintiffs. Defendant merely supplemented the facts presented by plain-

tiffs by the submission of uncontroverted additional facts, mostly in documentary form, which dovetail into the facts presented by plaintiffs and round out the picture.

Defendant submitted copy of the proposal made by plaintiffs in which plaintiffs certified that they had informed themselves fully "in regard to the conditions to be met" in execution of the contract. (R. 95.)

Defendant submitted the details in reference to the amount of unpaid lien claims. On October 15, 1942, unpaid lien claims were in the amount of $17,023.00 by plaintiffs' own statement to defendant in affidavit form. On February 1, 1943, unpaid lien claims amounted to $23,886.22; and since that time additional claims have been presented and all of said bills remain unpaid. (R. 55.)

Plaintiffs had submitted Estimate No. 9, dated October 3, 1942 (R. 84-85), which established that monthly estimates were submitted by defendant's engineer and approved by plaintiffs showing the amount of "labor and materials incorporated in the work" during the preceding month in accordance with the terms of the contract. Such estimate included "extras", and showed uncompleted excavation work in the amount of $1900.00. (R. 84.) Defendant added estimate dated December 2, 1942, showing uncompleted excavation work in the amount of $950.00 (R. 54), estimate dated January 2, 1943, showing uncompleted excavation work in the amount of $600.00 (R. 66-67) and estimate dated February 1, 1943, showing uncompleted excavation work in the amount of $330.00. (R. 68-69.)

The series of estimates demonstrated that estimates were made monthly and approved by plaintiffs, that performance of no amount of excavation work as alleged in plaintiffs' complaint was asserted, but performance of a negligible quantity of excavation work, that the amount of extra work performed or in process was shown but no extra for

excavation of the basin, or in other words, no suggestion of the claim asserted in plaintiffs' complaint was contained in the monthly estimates approved by the plaintiffs in writing up to February 1, 1943.

Defendant established by submission of estimate dated February 1, 1943, that total contract price and extras authorized up to that date amounted to $86,154.03. (R. 69.) Defendant asserted, and the facts were not disputed, that approximately $4500.00 remained unpaid on the original contract price, and $10,103.57 was retained (being the 15% retention provided by the contract) making the total sum of $14,603.57 withheld by defendant. (R. 47.)

Defendant submitted copy of notice dated December 29, 1942 (R. 61), from the attorney for defendant's Water & Light Commission to plaintiffs demanding prosecution of the work under penalty of having the contract declared in default in accordance with the terms of the contract, Section 10. (R. 23-24.) This was followed by similar warning from defendant's engineer dated January 1, 1943 (R. 62-64), and culminated in notice declaring the contract in default dated February 2, 1943. (R. 64-65.)

The provisions of Section 10 of the contract (R. 23-24) vested in the judgment of defendant's engineer determination whether or not the contract was "being executed in a sound and workmanlike manner" and specified the procedure for declaration of default which was followed. (R. 23-24.)

The facts hereinbefore summarized relate to the simple question whether or not the absence of meritorious cause of action for breach of warranty in plaintiffs was not established as a matter of law. The most important subject matter presented by this petition, however, is largely procedural. Therefore, a statement of procedural facts and certain related facts, which could not be under-

stood without the preceding statement of the basic facts follows.

Original complaint (R. 2-5) was dismissed on defendant's motion with leave to file amended complaint. (R. 10-11.) While the original complaint casually referred to provisions of the contract for compensation for extra work, direction by defendant's engineer in writing for performance of the work and presentation of claim by the 5th day of the month succeeding the month in which the work was performed (conditions precedent to recovery for extra work by the specific terms of the contract) (R. 25) are not claimed. (Par. 9, R. 3; Par. 10, R. 4) The complaint clearly attempted to set forth a cause of action for breach of warranty and made no attempt to state a cause of action for recovery of compensation for extra work.

Amended complaint was then filed containing identical allegations, with slight changes in verbiage, as to breach of warranty. (R. 11-15.) A new element—the suggestion, far short of the assertion of cause of action for recovery for extra work under the contract—was indirectly injected and that is the source of all of the subsequent trouble.

The contract provides for performance of four classes of work, (a) the basic work in accordance with the plans and specifications at a fixed price, (b) earth excavation and disposal added or subtracted at a unit price, (c) backfill added or deducted at a unit price, and a fourth class unlettered in the contract which we designate (d) extra work not covered by the foregoing unit prices for which the contractor was to receive "actual cost of material furnished and labor performed plus Fifteen (15%) per cent for profit, use of tools, equipment, job superintendent, timekeeper, and general supervision, and any other overhead and fixed charges." (R. 18-19.)

The amended complaint describes the work of excavating the basin after discovery of absence of rock at the elevation anticipated as work not included in classes (a), (b), and (c) of the contract for which fixed or unit prices were established (Par. 8, R. 12-13) but as included in class which we designate as (d) for which compensation was to be on the basis of actual expense. (Pars. 9-10; R. 13.)

The amended complaint then states that the plaintiffs duly made claim to defendant's engineer as provided in the contract and the claim was denied. (Par. 13, R. 14.)

There follows this deceptive and confusing paragraph:

> "The action of the engineer and the defendant in refusing to allow said claim and to ascertain, allow, approve, and certify for payment the amount due the plaintiffs for the said different work performed under the contract *pursuant to the engineer's direction in writing* was arbitrary and unjust and not in accordance with the contract." (The italics are ours for emphasis) (Par. 13, R. 14.)

Disallowance of the claim and non-payment thereof is then alleged as excuse for plaintiffs' non-completion of the work and their non-payment of lien claims. (Par. 13, R. 14.)

Motion by defendant to dismiss the amended complaint was denied, the Court in its opinion pointing out the provision of the contract relating to compensation for the performance of extra work upon express order of defendant's engineer in writing, and the allegation that defendant's engineer directed in writing performance of the work for which recovery was sought. (R. 39-40.)

Thereafter defendant moved for summary judgment supporting the motion by an affidavit of defendant's engineer that there was no order in writing for performance of the work. (R. 51.)

The Court granted the motion and judgment of dismissal of plaintiffs' complaint was entered (R. 99) and plaintiffs appealed from this judgment. (R. 101.)

The contract specifically provides that the contractor shall have no claim for compensation for extra or additional work, using the two terms synonymously, unless the same is previously ordered in writing by defendant's engineer, and unless the claim therefor is presented to defendant's engineer before the 5th day of the month following that during which each specific order is complied with. (R. 25.)

The amended complaint does not state that defendant's engineer ordered the work in writing. It merely infers that by stating that his refusal to allow claim for the work performed "pursuant to the engineer's direction in writing" was arbitrary. (R. 14.)

The amended complaint does not state that claim was presented to defendant's engineer before the 5th day of the month following that during which the work was performed, but it states generally that "plaintiffs duly made claim to defendant's engineer as provided in the contract". (R. 14.)

On motion for summary judgment with affidavit of defendant's engineer that there was no order in writing for performance of the work (R. 51) plaintiffs failed to produce such order.

There was no contradiction by plaintiffs of the facts demonstrated by the monthly estimates approved by plaintiffs hereinbefore enumerated that such estimates stated that the amount of extra work performed during the preceding month as well as work under the contract, and total excavation work from October 1942 until default of the contract on February 1, 1943 was negligible. The fact that claim was not made until after the contract was defaulted is verified by plaintiffs. (R. 74.)

The fact that extra excavation ordered by defendant's engineer in writing was restricted to trenching and lowering of baffle walls was established by plaintiffs. (R. 76, 77, 80-81, 84.)

The granting of defendant's motion for summary judgment was in effect an application of the law of the case which the court established by dismissal of the original complaint that the facts stated did not establish a cause of action for breach of warranty. (R. 7-11.) To this the Court must have added the determination that cause of action for recovery for extra work under the contract was not established.

On oral argument in the Circuit Court of Appeals counsel for appellants unequivocally stated that whether or not plaintiffs were entitled to recovery for breach of warranty was the sole issue and the Court took the matter under advisement with that understanding. (R. 130.)

On that record the Appellate Court held that it must accept the allegations of the complaint as true (R. 116), stated the rule to be "that a court must accept plaintiffs' fact allegations and statements in their affidavits and only on the assumption of their verity, yet insufficient, may summary judgment be entered against them" (R. 118) and recognized as one of the bases of plaintiffs' claim the assertion by plaintiffs that defendant's engineer ordered the additional work when the error in the specifications as to the location of bed rock was discovered. (R. 116.)

The court holds that certain factual issues exist, and reverses the judgment with directions to try those factual issues first. The factual issues enumerated are as follows:

1. Were the bed rock representations in the drawings warranties upon which plaintiffs could and did rely in entering into the contract?

2. Was plaintiffs' failure to make the payments necessary for the completion of the contract excused (a) by defendant's failure to make all payments due the plaintiffs or (b) by the added cost and trouble traceable to the rock bottom representations?

3. Lack of written order by the engineer for the additional work and expense, or a waiver by the parties of such written order?

4. Other factual questions raised by the defendant, including controversy as to the completeness of the work and dispute as to time for completion of the work, specifically set forth by the court. (R. 118-119.)

Statement As To Jurisdiction.

The judgment of the Circuit Court of Appeals was entered June 21, 1945, (R. 120) rehearing denied July 17, 1945. (R. 155.) The jurisdiction of this Court rests on Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C.A. Section 347).

Questions Presented.

1. Does Rule 56(c) of the Rules of Civil Procedure require that on motion for summary judgment by defendant the Court must accept plaintiffs' fact allegations and statements in their affidavits, and only on the assumption of their verity, yet insufficient, may summary judgment be entered against them, as stated by the lower Court, or may the contrary facts be established beyond controversy by affidavits submitted by the defendant?

2. Upon reversal of summary judgment of the District Court dismissing an action, under Rule 56(d) of the Rules of Civil Procedure, should the Circuit Court of Appeals remand the action to try all issues without ascertainment, or ascertain, or make provision for ascer-

tainment, of such material facts as exist without substantial controversy?

3. Under the facts disclosed in the record is not recovery by plaintiffs for breach of warranty precluded as a matter of law?

4. Under the facts presented by the record, and the law, was the Circuit Court of Appeals correct in reversing the judgment of the District Court dismissing plaintiffs' complaint?

Reasons Relied On For Allowance of Writ.

1. This case presents an important Federal question under the summary judgment rule, Rule 56(c) of the Rules of Civil Procedure, determined by the lower Court in conflict with, or probably in conflict with, the decisions of this Court particularly in the case of *Sartor* v. *Arkansas Nat. Gas,* 321 U. S. 620, 64 S. Ct. 724, 88 L. Ed. 967.

The lower Court stated the rule to be that on motion by defendant for a summary judgment, the Court must accept plaintiffs' fact allegations and statements in their affidavits, and only on the assumption of their verity, yet insufficient, may summary judgment be entered against them, excluding establishment of contrary facts beyond controversy by affidavits submitted by the defendant. Such statement of the rule is in conflict with, or probably in conflict with, the decisions of this Court.

2. This case presents an important Federal question under Section 56(d) of the Summary Judgment Rules which has not been, but should be, settled by this Court namely: Where the Circuit Court of Appeals reverses the judgment of the District Court which dismissed plaintiffs' complaint, should the Appellate Court remand the cause with direction to try all issues, as it did, or ascertain, or make provision for ascertainment, of material facts which exist without substantial controversy?

3. In holding that the alleged representations of elevation of underlying rock contained in the plans and specifications, under the facts and circumstances disclosed in the record, might constitute a warranty upon which plaintiffs could possibly establish a cause of action for breach of warranty, the Circuit Court of Appeals decided an important question of general law in a way in conflict with the decisions of this Court. The question whether or not a contractor for construction of a municipal project may recover if representations of the character alleged in this case prove false, upon the facts and circumstances disclosed in the record, is an exceedingly important question of general law which affects, or will affect innumerable contracts for large construction projects by various governmental units and private parties, particularly in the post-war building era which we are now entering.

The decisions of the Circuit Court of Appeals is in conflict with the decisions of this Court which established the law with certainty, and have been accepted generally by state as well as federal Courts throughout the country, as the leading cases on the subject, namely:

MacArthur Bros. Co. v. *U. S.*, 258 U. S. 6, 42 S. Ct. 225, 66 L. Ed. 433.

Simpson v. *U. S.*, 172 U. S. 372, 19 S. Ct. 222, 43 L. Ed. 967.

The statement of the rule is amplified in the decisions of this Court reaching opposite results in the cases of:

Hollerbach v. *U. S.*, 233 U. S. 165, 34 S. Ct. 553, 58 L. Ed. 898.

U. S. v. *Atlantic Dredging Co.*, 253 U. S. 1, 40 S. Ct. 423, 64 L. Ed. 735.

Christie v. *U. S.*, 237 U. S. 34, 35 S. Ct. 565, 59 L. Ed. 933.

These cases are distinguished in the *MacArthur* case, and by comparison of all five cases the character of the representations and the facts and circumstances necessary to establish a warranty and recovery for breach of warranty in this class of case made plain and the conflict with the decision of the lower court made apparent.

4. Reversal by the lower Court of the judgment of the district Court and remanding of the cause with directions to try all issues, including factual issues, established beyond controversy, issues specifically eliminated by the parties, issues designated by the Court as factual which are issues of law, and issues not even raised is so far a departure from the accepted and usual course of judicial procedure as to call for the exercise of this Court's power of supervision.

Wherefore, your petitioner prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and send to this Court for review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in Cause No. 8635 entitled *"Clarence Furton, Truman Furton, Luke Furton, Fred Furton and Ralph Johnson, Co-Partners Doing Business as Furton Brothers Construction Company, Plaintiffs-Appellants,*

v. *City of Menasha, Defendant-Appellee,*" and that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit may be reviewed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just and meet; and your petitioner will ever pray.

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